Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1386

FRISCO LAND & MINING CO.,
a corporation,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST DISTRICT, DIVISION ONE, AFTER ENTRY OF ORDER BY SUPREME COURT OF THE STATE OF CALIFORNIA DENYING A HEARING

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DENYING A HEARING

Petitioner prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First

District, Division One, entered on November 7, 1977.

OPINIONS BELOW

The opinions of the Marin County Superior Court in this case are unreported. The memorandum and minute order denying the State's Motion to Dismiss is set forth in Appendix E. The memorandum and minute order granting the State's Motion for Summary Judgment is set forth in Appendix D. The order dismissing Petitioner's complaint is set forth in Appendix C.

The order of the California Supreme Court denying a hearing is set forth in Appendix B. The opinion of the Court of Appeal of the State of California is reported at 74 Cal.App.3d 736; 141 Cal.Rptr. 810; and is set forth in Appendix A.

JURISDICTION

The judgment of the California Court of Appeal, set forth in Appendix A, was

entered on November 7, 1977. The order of the California Supreme Court denying a hearing was filed on January 4, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether merely for planning purposes the State of California can prevent the only use which Petitioner can make of its private property and yet not be liable in inverse condemnation for Petitioner's loss of the property resulting from its inability to put the property to any economic use?

2. Whether the State of California can, by legislative act, immunize itself and its agents from any liability under the Fifth and Fourteenth Amendments for taking private property without paying just compensation?

3. Whether Petitioner must exhaust

a futile administrative "remedy" after its property has been taken from it before suing the state for just compensation under the Fifth and Fourteenth Amendments?

4. Whether Petitioner was denied due process of law under the Fifth Amendment when an initiative statute establishing a regulatory commission and simultaneously preventing the only use which could be made of its property provided no administrative relief procedure whatsoever for five months after the statute became effective?

5. Whether it is a denial of equal protection of the law under the Fourteenth Amendment to attempt to compel donations of property for public use from Petitioner by denying building permits to third parties for the construction of houses?

6. Whether it is a denial of equal protection of the law under the Fourteenth

Amendment to impose a moratorium on all land use in a planning area when the effect on one owner, i.e. Petitioner, a residential subdivider who has encumbered its land to pay for residential improvements, is to deprive it of all economic benefits which can be derived from its land, directly resulting in its permanent loss through foreclosures, while the effect on other property owners in the same area is merely one of inconvenience or delay in development?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment V

"No person shall...be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

"...nor shall any State deprive any person of life, liberty or property, with-

out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes

California Government Code Sec. 818.4
Issuance, Denial, Suspension or Revocation of Permit, License, etc.

"A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."

The California Coastal Zone Conservation Act of 1972 (formerly Public Resources Code Sections 27000 to 27650).[1]

Sec. 27400. Necessity of permit.

"On or after February 1, 1973, any person wishing to perform any development within the permit area shall obtain a permit authorizing such development from the regional commission and, if required by law, from any city, county, state, regional or local agency."

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1. The 1972 Act was repealed by Section 27650 on January 1, 1977. (It was replaced, essentially, by The California Coastal Act, Public Resources Code Sections 30000 et seq.)

Sec. 27404. Vested rights.

"If, prior to November 8, 1972, any city or county has issued a building permit, no person who has obtained a vested right thereunder shall be required to secure a permit from the regional commission; ...Any such person shall be deemed to have such vested rights if, prior to November 8, 1972, he has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor."

Sec. 27500. Civil fine.

"Any person who violates any provision of this division shall be subject to a civil fine not to exceed ten thousand dollars ($10,000)."

Sec. 27501. Additional penalties.

"In addition to any other penalties, any person who performs any development in violation of this division shall be subject to a civil fine not to exceed five hundred dollars ($500) per day for each day in which such violation persists."

STATEMENT OF THE CASE

This case was decided in the trial court on a Motion for Summary Judgment granted to the State of California by the Superior Court of Marin County and the following facts are undisputed:

In 1971 Petitioner acquired 550 acres of land located on the Pacific Ocean at Dillon Beach, Marin County, California. A portion of the land was then subdivided into 146 single-family lots and Petitioner spent over $500,000 on water, sewer, electrical and street improvements as required by local and state subdivision laws. Permits were obtained from eight local, state and federal agencies allowing the subdivision of the land and the sale of the lots, which commenced in June 1972. At this point, the only use which could be made of Petitioner's property was as sites for the construction of houses and Petitioner's annual payments

on a promissory note and assessment bonds, secured by liens on the property, were approximately $150,000 per year. (CT 303-305.)[1]

The California Coastal Zone Conservation Act of 1972, an initiative statute, became law on November 8, 1972 (hereinafter called "the 1972 Act"). The 1972 Act created a regulatory structure consisting of a State Commission and six Regional Commissions to plan for coastal conservation and to regulate coastal development during the planning period, which lasted until January 1, 1977. (Pub. Res. Code Sec. 27650). All construction of any kind was prohibited within the planning area

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1. References to CT are to the Clerk's Transcript on Appeal prepared by the Marin County clerk from the trial court proceedings and delivered to the California Court of Appeal, First District.

unless the development was exempt from regulation under Pub. Res. Code Sec. 27404 or a permit was obtained under Pub. Res. Code Sec. 27400. The penalty for constructing a house without an exemption or a permit was an initial fine not to exceed $10,000 (Pub. Res. Code Sec. 27500) and an additional fine not to exceed $500 per day for every day the violation persisted. (Pub. Res. Code Sec. 27501).

Between June and November 1972 Petitioner had sold approximately twenty lots to provide the cash flow to service its debts and to pay its real property taxes. (CT 3-4). Petitioner's lots became unusable and unsaleable on November 8, 1972, because they were then subject to regulation by a commission not yet formed. The North Coast Regional Commission (hereinafter called "the Commission"), having jurisdiction over Petitioner's land, was

not organized until February 1973. Forms for claiming an exemption were not even available until March 1973 and it was May 1973 before Petitioner could obtain any ruling on a claim for exemption filed with the Commission in the previous March. During this six months in which no administrative remedy was available to Petitioner its debts mounted precariously. (CT 3-7).

In May 1973 the Commission determined that Petitioner's subdivision was exempt from regulation pursuant to Pub. Res. Code Sec. 27404 but that Petitioner only had a vested right to complete the expenditure of $500,000 on subdivision improvements as required by its performance bond posted with the County of Marin. Simultaneously, the Commission held that the subdivision lots could not be put to their only use, i.e., the construction of houses, until permits were obtained from the Commission. (CT 306-308)

Petitioner then entered into a quagmire of dealings with the Commission seeking any relief it could obtain which would allow the third party lot owners to build houses so that Petitioner's lots could be sold and cash produced for the payment of its debts. From May 1973 until September 1973 the Commission refused to issue a permit, adding new proposed conditions every few weeks. This vacillation culminated on September 20, 1973, when the Commission adopted eight conditions for any permit, including a condition that Petitioner donate for public use a public access across property that Petitioner did not even own--a legal impossibility! Petitioner's property had been declared exempt from regulation under the 1972 Act and the Commission could only hope to impose new conditions on it by refusing to allow the property to be put to

its only use, i.e., as sites for houses. At this point, Petitioner was in default on all of its obligations, in arrears on its property taxes, its lots were totally unsaleable, and lien holders were threatening foreclosures. (CT 8-13, 308-311).

Petitioner's Complaint in inverse condemnation against the State of California was filed in Marin County Superior Court on May 20, 1974. The state demurred to the complaint on August 5, 1974. Petitioner's Opposition to Demurrer was filed on September 16, 1974. This was Petitioner's first opportunity to raise federal constitutional issues in the trial court and it did so in its brief arguing as follows:

> "The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without the payment of just compensation. The due process clause of the Fourteenth Amendment to the United States Constitution makes applicable to the states this federal constitutional principle of the Fifth Amendment. Chicago, B. & Q.

R. R. v. Chicago, (1897) 166 U.S. 226; Foster v. City of Detroit, (1966) 254 F.Supp. 655.

> There are therefore dual criteria which the Court must examine in determining whether there has been a damaging or taking of Plaintiff's property by Defendant and both state and federal cases must be examined." (CT 40 SS).

Petitioner also argued that the right to "possess, use and dispose" of its property was protected by the Fifth Amendment. (CT 40 XX). The trial court overruled the demurrer on October 9, 1974, stating that Petitioner had a cause of action for the taking of its property if it could prove that the Commission was withholding permits from third parties to impose conditions on Petitioner, citing Bydlon v. United States, 175 F.Supp. 891, as its authority. The trial court also held that Petitioner did not have an administrative remedy with regard to third party building permits and did not even need to exhaust administrative remedies if it could estab-

lish a cause of action in inverse condemnation. (CT 40 III-KKK). (Appendix E).

On July 7, 1975, the state filed a Motion for Summary Judgment. In its Points and Authorities in Opposition to the motion, Petitioner renewed its Fifth and Fourteenth Amendment arguments verbatim from its earlier brief. (CT 281). Six months later on December 30, 1975, the trial court reversed itself completely, holding that the 1972 Act was an interim measure and its effects could not constitute inverse condemnation, citing State of California v. Superior Court (Veta), 12 Cal.3d 237, 115 Cal.Rptr. 497. The trial court did not mention the Bydlon case, supra, which it had relied on in overruling the state's demurrer. (CT 342-344). (Appendix D).

On September 17, 1976, Petitioner filed its appellate brief in the California Court of Appeal, First District. Again Petitioner repeated verbatim its Fifth and Fourteenth Amendment arguments originally used in the trial court. Petitioner stressed that its right to "possess, use and dispose of its property" was protected by the Fifth Amendment, that the "forced donation" of property by Petitioner deprived it of equal protection of the law and that the unavailability of administrative remedies was a denial of procedural due process. The Court of Appeal rejected all of Petitioner's constitutional arguments on the basis that the state could impose a four-year moratorium on any construction within the coastal zone and that, therefore, the denial of building permits could not constitute a compensable taking regardless of the consequences to Petitioner. The court also held, in effect,

that the state permanently retained the right to require the dedication of private property to the public as a condition to the construction of homes on subdivision lots. When the Court of Appeal affirmed the trial court on November 7, 1977, Petitioner then petitioned the California Supreme Court for a hearing and renewed its federal constitutional arguments in its brief to that court. The hearing was denied on January 4, 1978.

REASONS FOR GRANTING THE WRIT

I

UNDETERMINED FEDERAL QUESTIONS

This case presents several federal constitutional questions which this Court has never answered.

These essential facts are undisputed: Petitioner subdivided land and spent over $500,000 on subdivision improvements so that it could sell lots to the

public. By reason thereof the only use which could be made of the lots was as sites for the construction of houses. The State of California prevented that use for planning purposes and, because of that prevention, Petitioner ultimately lost over $2,000,000 worth of lots through deed of trust and bond foreclosures.

Petitioner argued to the California Court of Appeal that the right to possess, use and enjoy its property was a property right protected by the Fifth Amendment, citing United States v. General Motors, 323 U.S. 373, 377-380, and United States v. Causby, 328 U.S. 256, 262. It further argued that numerous decisions of this Court and lower federal courts hold that government action which prevents the only use which can be made of property constitutes a compensable taking under the Fifth Amendment. United States v. Kansas

City Life Ins. Co., 339 U.S. 799; United States v. Causby, 328 U.S. 256; Bydlon v. United States, 175 F.Supp. 891; Highland Park, Inc. v. United States, 161 F.Supp. 597. The California Court of Appeal ignored this argument AND DID NOT EVEN DISCUSS THESE FEDERAL CASES. Its response was simply that the state could put a four-year moratorium on all uses of property without any liability for taking or damaging it. (Appendix A, p. 15). The Court of Appeal cited State of California v. Superior Court (Veta), 12 Cal.3d 237, 115 Cal.Rptr. 497, to support is position. The Veta case, supra, was the first case under the 1972 Act passing on the validity of a four-year moratorium on the use of property. It cited several California zoning cases as authority for the use of planning moratoriums but not one of those cases prevented all uses of private pro-

perty. Zoning cases universally leave the owner some use of his property.

Petitioner next argued that the prevention, just as a planning technique, of the only use which could be made of its property culminating in its loss through foreclosures, could not be justified as an exercise of the police power. It further pointed out that the only decisions of this Court permitting such a drastic use of the police power deal with prohibition of nuisances or involve the protection of public health, safety or morals as demonstrated in Northwestern Laundry v. City of Des Moines, 239 U.S. 486; Hadachek v. Sebastian, 239 U.S. 394; and Goldblatt v. Town of Hempstead, 369 U.S. 590. THERE NEVER HAS BEEN A DECISION OF THIS COURT WHICH JUSTIFIED THE USE OF THE POLICE POWER TO PREVENT THE ONLY USE WHICH COULD BE MADE OF PRIVATE PROPERTY

MERELY FOR ESTHETIC OR PLANNING PURPOSES. In similar situations the lower federal courts are expanding the protection of the Fifth Amendment, not decimating it. See Dahl v. City of Palo Alto, 372 F.Supp. 647, Bydlon v. United States, 175 F.Supp. 891; Drakes Bay Land Company v. United States, 424 F.2d 574; and Foster v. Herley, 330 F.2d 87.

Conversely, the absence of decisions from this Court has led the California courts to ignore the Fifth Amendment with regard to Petitioner's private property rights. The California courts abandoned any test of fairness or reasonableness or any balancing of equities between the state and Petitioner where merely planning legislation was involved. There is nothing in the record in this case even suggesting that building houses on Petitioner's subdivision lots would con-

stitute a nuisance; such a contention would be facetious. In view of the fact that Petitioner's subdivision was reviewed and approved in 1971 and 1972 by eight local, state, and federal agencies, could it be seriously maintained that such use of the lots would endanger the public health, safety or morals?

The Court of Appeal rejected these arguments on the basis that there was "no invasion or appropriation" of Petitioner's property rights. It then erroneously cited Mugler v. Kansas, 123 U.S. 623 and Goldblatt v. Hempstead, 369 U.S. 590, to support its position. (Appendix A, p. 55-57). Those cases only allow the police power to be used to prohibit the use of land where a nuisance or "public health, morals or safety" are involved.

Perhaps the most absurd holding of the California Court of Appeal is that

Petitioner cannot sue the state in inverse condemnation because the state has granted itself immunity by California Government Code Sec. 818.4. (Appendix A, p. 60). This is not the law. Legislative acts cannot abolish constitutional rights. Whether the enactment of a law and/or its administration constitute a taking of property without the payment of just compensation is a judicial question. See Eldridge v. City of Palo Alto, 57 Cal. App.3d 613, 618-621;, 129 Cal.Rptr. 575, 577-579 and cases cited. Equally absurd is the statement by the Court of Appeal that the state could not be liable for its unreasonable conduct because "the state has never taken any action to condemn the subdivider's property." (Appendix A, p. 52). The intention to formally condemn property is not a prerequisite to a property owner's right to sue for just

compensation for the taking of his property when such a taking occurs. Virtually every inverse condemnation case coming to an appellate court involves a factual situation where the government agency being sued had no intent to condemn the property.

Petitioner argued to the California Court of Appeal that the absence of any administrative remedy for over five months denied it due process of law and cited Fuentes v. Shevin, 407 U.S. 67, which holds that a person is denied due process if he is not given an opportunity for a hearing before a significant property interest is taken. It also cited the recent California case of Blair v. Pitchess, 5 Cal.3d 258, 96 Cal.Rptr. 42, because that case held that the California claim and delivery law violated the Fifth and Fourteenth Amendments because it de-

prived people of the "use" of their property without a hearing. In the instant case the only use of Petitioner's property was taken for over five months without a hearing. The feeble answer by the Court of Appeal was that the state did not have to furnish a hearing procedure because no action could be maintained during the four-year interim moratorium anyway. (Appendix A, p. 13). Fuentes v. Shevin, supra, and related cases were brushed off as not in point. (Appendix A, p. 45).

From May 1973 to September 1973 Petitioner attempted to obtain a permit so that its property could be put to its only use. By September 1973 Petitioner's property was already being taken, there was no hope of preventing deed of trust and bond foreclosures, so it abandoned the futile pursuit of administrative remedies and prepared to sue the state for taking

its property. In its brief to the Court of Appeal, Petitioner cited both federal and state cases which hold that after the state has taken property without paying just compensation, judicial relief is proper and it is not necessary to exhaust administrative remedies. Indeed, such a requirement would be an exercise in futility. Dahl v. City of Palo Alto, 372 F.Supp. 647, Sneed v. County of Riverside, 218 Cal.App. 205. Of what possible use would it be to obtain a permit to build a house after the property has been taken by the state? Where does the money come from to pay for administrative, and eventually, judicial appeals, after a property owner has lost his property and is virtually in bankruptcy? The California Court of Appeal refused to discuss this argument even though it is undisputed that Petitioner's property was in fact taken before

its administrative remedies were exhausted.

CONCLUSION

It is time that land planning for conservation and preservation of the environment be put into perspective with regard to the Fifth and Fourteenth Amendments. As shown above in this petition, every basis of the California Court of Appeal decision is incompatible with the protection of Petitioner's property rights guaranteed by the United States Constitution.

The callous approach of the California courts to Petitioner's plight is demonstrated by these quotes from the trial court and the appellate court:

> "The fact that Plaintiff is financially unable to 'weather the storm' by meeting the cost of carrying its development during the interim period comtemplated by the act does not transform otherwise constitutional legislation into an unconstitutional taking of private property." (Appendix D, p. 4).

> "...it is apparent that the measure of damage occasioned by the application of conditions to a property owner's use of his property should not vary with the equity the property owner has in his land or his financial ability to forego its economic use for a time." (Appendix A, p. 62).

Surely those quotations evidence an elitist approach to constitutional rights. Petitioner, unfortunately, is not one of the privileged few who, because of virtually limitless wealth, could forego all economic use of their property for years at a time. The falacious reasoning of the trial court and the Court of Appeal was that Petitioner must endure its permanent property losses because others with greater financial resources might be able to forego the economic use of their property "for a [longer] time."

The writ should be granted so that this Court can decide these unanswered federal constitutional questions:

1. Can the state, merely for planning purposes, where neither a nuisance nor public health, safety or morals are involved, prevent the only use which can be made of real property without incurring liability for inverse condemnation?

2. Does due process of law require the state to provide a hearing before it takes, for planning purposes, the only use which a private property owner can make of his real property?

3. Does a property owner have to pursue futile administrative remedies after his property has been taken before he can sue for just compensation?

4. After real property has been subdivided, improved and sold pursuant to existing local, state and federal laws, can the electors at a later date initiate new laws which prevent the only use an owner can make of his property unless the

owner donates property to the public for public use?

5. Can the state, by legislative act, immunize itself from liability under the Fifth Amendment for taking property without paying just compensation?

Respectfully submitted,

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